Wong Kim Woon v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–36–98
ABDUL WAHAB J
12 OCTOBER 1998

Criminal Procedure *— Bail — Revocation of — Appellant granted bail — Failure to attend court — Breach of terms for bail — Whether bail should be revoked or cancelled — Whether there was exercise of inherent jurisdiction by sessions court*

Criminal Procedure *— Bail — Revocation of — Appellant granted bail — Failure to attend court — Warrant of arrest issued — Revocation of bail — Whether appellant given opportunity to explain why bail should not be revoked — Whether revocation bad in law*

The appellant was charged with four counts of offences under s 420 of the Penal Code (FMS Cap 45) and was granted bail by the sessions court under s 387 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The appellant failed to attend court on various hearing dates. A warrant was issued for the appellant's arrest whereby the appellant produced a medical certificate to explain he was ill. Dissatisfied with the explanation, the sessions court revoked and cancelled bail and committed the appellant to custody. Hence the appeal against the decision of the sessions court.

Held, ordering the sessions court to hear the appellant as to why bail should not be cancelled or revoked:

(1) The words 'shall be released on bail' in s 387(1) of the CPC, given their literal and natural meaning, mean that bail must be offered. To refuse to offer bail on the ground that the accused will put a fair trial into jeopardy is contrary to s 387 where bail is mandatory. The correct practice in bailable offences is to offer bail, and if there is evidence that the accused is interfering with witnesses or is conducting himself such as would put a fair trial into jeopardy, then only the question of revoking or cancellation of the bail arises for consideration (see pp 118D and 119C–D); *R v Lim Kwang Seng & Ors* [1956] MLJ 178 and *Mohd Jalil bin Abdullah & Anor v PP* [1996] 5 MLJ 564 followed.

(2) Whether bail was mandatory or discretionary, the issue here was the breach of the terms of a court order for bail. The fact that bail for the original offence was mandatory was irrelevant. Where there has been a breach of that fundamental term of the bail, the consequence must be that bail be revoked or cancelled. Here, there was no exercise of an inherent jurisdiction and there was no contravention of s 387(1) of the CPC, since bail had been granted. The cancellation or revocation was simply a consequence of breach of its terms, and specific statutory power to cancel or revoke bail in such circumstances was unnecessary (see pp 119G–H and 120C–D); *PP v Wee Swee Siang* [1948] MLJ 116 distinguished.

(3) When the bail term has been breached and a warrant of arrest issued, the appellant, when he is brought before the court, must be given an opportunity to be heard first as to why the bail granted to him should not be revoked or cancelled. The fact he had breached the bail order is prima facie a valid reason for cancellation or revocation, unless he has a good explanation. In this case, it did not appear the appellant had been given such an opportunity. To that extent, the revocation or cancellation was bad in law (see pp 120G–H and 121D–E).

Obiter:

Where bail is mandatory is offered once under s 387(1) of the CPC, the continuation of the bail must be based upon the continued compliance of its terms and the withdrawal of it when it is breached. For the sessions court to be obliged to extend fresh bail after breach or abuse of the earlier bail, albeit on enhanced terms, cannot be the intention of Parliament (see p 121A, C–D).

[Bahasa Malaysia summary

Perayu telah didakwa dengan empat tuduhan kesalahan di bawah s 420 Kanun Keseksaan (NMB Bab 45) dan telah diberikan jaminan oleh mahkamah sesyen di bawah s 387 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Perayu telah gagal untuk hadir di mahkamah pada beberapa tarikh perbicaraan. Satu waran telah dikeluarkan bagi penangkapan perayu dan perayu telah mengemukakan sijil perubatan bagi menerangkan yang dia telah sakit. Tidak berpuas hati terhadap penerangan tersebut, mahkamah sesyen telah menarik balik dan membatalkan jaminan dan meletakkan perayu di bawah tahanan. Rayuan dibuat terhadap keputusan mahkamah sesyen.

Diputuskan, memerintahkan mahkamah sesyen untuk mendengar alasan perayu mengapa jaminan tidak patut ditarik balik atau dibatalkan:

(1) Perkataan-perkataan 'hendaklah dilepaskan dengan jaminan' di dalam s 387(1) KAJ, dengan merujuk kepada terjemahan sebenar dan asal, bermaksud jaminan hendaklah ditawarkan. Keengganan untuk menawarkan jaminan atas alasan bahawa tertuduh akan meletakkan perbicaraan yang adil di dalam bahaya adalah bertentangan dengan s 378 di mana jaminan adalah mandatori. Amalan yang betul di dalam kesalahan-kesalahan boleh jamin adalah dengan menawarkan jaminan, dan jika terdapat bukti bahawa tertuduh mengganggu saksi-saksi atau berkelakuan sebegitu rupa sehingga boleh meletakkan satu perbicaraan yang adil di dalam bahaya, barulah persoalan mengenai penarikan balik atau pembatalan jaminan tersebut boleh dipertimbangkan (lihat ms 118D dan 119C–D); *R v Lim Kwang Seng & Ors* [1956] MLJ 178 dan *Mohd Jalil bin Abdullah & Anor v PP* [1996] 5 MLJ 564 diikut.

(2) Sama ada jaminan adalah mandatori atau budi bicara, isu di sini adalah kemungkiran terma-terma perintah mahkamah berkenaan jaminan. Hakikat bahawa jaminan untuk kesalahan asal adalah mandatori adalah tidak relevan. Apabila telah terjadi satu kemungkiran terhadap terma-terma penting sesuatu jaminan, akibatnya mestilah jaminan tersebut ditarik balik atau dibatalkan. Di sini, tidak terdapat penggunaan satu bidang kuasa sedia ada dan tidak terdapat perlanggaran terhadap s 387(1) KAJ, memandangkan jaminan telah diberikan. Pembatalan atau penarikan balik adalah satu akibat daripada kemungkiran terma-termanya, dan kuasa statutori tertentu untuk membatalkan atau menarik balik jaminan dalam keadaan sedemikian adalah tidak perlu (lihat ms 119G–H dan 120C–D); *PP v Wee Swee Siang* [1948] MLJ 116 dibeza.

(3) Di mana terma jaminan telah dimungkiri dan satu waran penangkapan telah dikeluarkan, perayu, apabila dia dibawa ke mahkamah, mestilah diberikan peluang untuk didengari terlebih dahulu mengapa jaminan yang diberikan kepadanya tidak patut ditarik balik atau dibatalkan. Hakikat yang dia telah memungkiri perintah jaminan itu adalah prima facie satu alasan yang sah untuk pembatalan atau penarikan balik, melainkan dia mempunyai alasan yang baik. Dalam kes ini, tidak kelihatan seperti perayu telah diberi peluang sebegitu rupa. Pada tahap itu, penarikan balik atau pembatalan tersebut adalah tidak sah dari segi undang-undang (lihat ms 120G–H dan 121D–E).

Obiter:

Di mana jaminan adalah mandatori ditawarkan sekali di bawah s 387(1) KAJ, keberterusan jaminan hendaklah berdasarkan pematuhan berterusan terma-termanya dan penarikan balik apabila ianya dimungkiri. Bagi perlu untuk mahkamah sesyen memberi jaminan baru selepas kemungkiran atau penyalahgunaan jaminan yang awal, walaupun dengan menambahkan terma-terma, tidak mungkin menjadi niat Parlimen (lihat ms 121A, C–D).]

Notes

For a case on bailable offences, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 584.

Cases referred to

Curtis v Stovin (1889) 22 QBD 512 (refd)
Datuk Yong Teck Lee & Ors v PP [1996] 2 MLJ 68 (refd)
Emperor v Jiwan Lal Gauba AIR 1936 Lah 730 (refd)
Ex parte Welchman (1897) 11 Ch D 48 (refd)
Grundt v Great Boulder Proprietary Gold Mines [1947] 2 All ER 439 (refd)

A *Hawtrey v Beaufront Ltd* [1946] KB 280 (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544 (refd)
Mohd Jalil bin Abdullah & Anor v PP [1996] 5 MLJ 564 (folld)
PP v Phang Yong Fook [1988] 1 MLJ 267 (refd)
PP v Wee Swee Siang [1948] MLJ 116 (distd)
B *R v Lim Kwang Seng & Ors* [1956] MLJ 178 (folld)
R v Mansel Jones (1889) 23 QBD 29 (refd)
Salomon v Salomon [1897] AC 22 (refd)

Legislation referred to

C Criminal Procedure Code (FMS Cap 6) ss 387(1), 394, First Schedule
Penal Code (FMS Cap 45) s 420

Ng Aik Guan (*Ng Aik Guan & Co*) for the appellant.
Ahmad Rosli bin Mohd Sham (Deputy Public Prosecutor) for the
D respondent.

Abdul Wahab J: This is an appeal against the decision of the learned judge of the sessions court on 14 August 1998 revoking the bail granted to the appellant. After hearing submissions, I had dismissed the appeal and ordered the judge of the sessions court to hear submissions as to why bail
E should not be revoked or cancelled. My reasons are as follows.

The appellant had been charged with four counts for offences under s 420 of the Penal Code (FMS Cap 45). He was granted bail in the sum of RM150,000. On various dates fixed for hearing, the appellant did not attend court, submitting medical certificates for various ailments. It was
F conceded by his own counsel on 14 August 1998 before the court that the appellant 'telah melarikan diri'.

It was argued by the deputy public prosecutor that the scheme of the Criminal Procedure Code (FMS Cap 6) ('the CPC') suggests that offences for which the penalty is more than seven years' imprisonment are non-bailable offences, that the penalty under s 420 of the Penal Code, originally
G a maximum of seven years' imprisonment, has been amended to make it a minimum of one year imprisonment and not more than 10 years. Thus, the offence under s 420 of the Penal Code should be treated as a non-bailable offence.

What is being urged would require a judicial amendment of the First
H Schedule of the CPC, ignoring the fact that the legislature itself did not make amendment to the First Schedule of the CPC to make the offence non-bailable. It has been held in *R v Mansel Jones* (1889) 23 QBD 29 at p 32 that it is not competent for a judge to modify the language of an Act. Particularly where the language is clear, the court cannot speculate on the intention of the legislature (*Salomon v Salomon* [1897] AC 22 at p 38), and
I the court must give effect to the language. Even if it appears that the legislature intends to make the offence non-bailable, a *casus omissus* may not be supplied or created (*Ex parte Welchman* (1897) 11 Ch D 48), since the First Schedule to the CPC is express and clear, and it is not shown that

adherence to the express language and meaning results in a manifest absurdity, futility or injustice, or an absurd anomaly (*Grundt v Great Boulder Proprietary Gold Mines* [1947] 2 All ER 439). While it does appear anomalous that an offence under s 420 of the Penal Code be bailable, it cannot be said to be an absurdity.

Section 387(1) of the CPC provides:

> When person may be released on bail
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> When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of Corporal or by such Court.

The words 'shall be released on bail', given their literal and natural meaning, mean that bail must be offered. This has been so held in *R v Lim Kwang Seng & Ors* [1956] MLJ 178. In *Mohd Jalil bin Abdullah & Anor v PP* [1996] 5 MLJ 564, Nik Hashim JC (as he then was) held that bail is mandatory under s 387. I respectfully agree with these views.

Mr Ng Aik Guan, for the appellant, has urged with erudition a novel point of law that since: (i) the sessions court has no inherent jurisdiction of its own (*Karpal Singh & Anor v PP* [1991] 2 MLJ 544; *Datuk Yong Teck Lee & Ors v PP* [1996] 2 MLJ 68), and must rely on statute for authority; and (ii) that the CPC does not provide for revocation or cancellation of the bail which is mandatory under s 387 of the CPC, the learned judge of the sessions court, regardless of the fact that the appellant had previously breached the terms of his bail, must grant bail to the appellant, albeit on enhanced terms.

The argument as to the jurisdiction is well founded. Since this is an appeal from the decision of the sessions court under s 394 of the CPC and not an originating application to the High Court for bail, this appeal must be confined to the correctness of the decision of the sessions court.

Mr Ng Aik Guan relied upon *Mohd Jalil bin Abdullah & Anor v PP* to support his argument that bail must be granted despite breach by the appellant. In that case, the hearing of the case had to be postponed several times on grounds mainly that either the first or the second applicant or both of them were absent. Bail was increased twice and the case was finally fixed for hearing on 21 May 1996. On that date, both applicants were again absent and warrants for their arrest were issued. The applicants surrendered. The first applicant explained with a medical certificate that he was ill, and the second applicant that he had mistaken the date. The learned sessions court judge, not satisfied with the explanations, revoked the bail and committed both to custody. The High Court in Kota Bharu, upon the issue whether the learned sessions court judge was right to revoke the bail, held (at pp 567–568):

> The court could well understand the frustration of the learned magistrate in dealing with these applicants. The record shows that they have abused the bail

A as an excuse not to attend court. The learned magistrate was right in issuing warrants of arrest against the applicants, and a show cause notice to the bailor for their absence. He was also right when he gave the applicants an opportunity to be heard before he proceeded to revoke the bail: *Phang Yong Fook v PP* [1988] 1 MLJ 267. But he was wrong when he ordered them to be remanded. This practice is illegal and not in compliance with the law: *Hamid's*
B *Criminal Procedure* at p 861.

With respect, *Hamid's Criminal Procedure* at p 861 only said:

> In practice, the subordinate courts refuse to grant bail in 'bailable offences' on the ground that there are sufficient reasons to show the accused will put a fair trial into jeopardy. This practice is illegal and not in compliance with the law.

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Section 387 of the CPC makes it mandatory to offer bail in bailable offences. To refuse to offer bail on the ground that the accused will put a fair trial into jeopardy is contrary to s 387 where bail is mandatory. The correct practice in bailable offences is to offer bail, and if there is evidence that the accused is interfering with witnesses or is conducting himself such
D as would put a fair trial into jeopardy, then only the question of revoking or cancellation of the bail arises for consideration.

But a consideration of whether bail already granted ought to be revoked or cancelled is entirely different and is distinguishable from the granting of bail. A court order granting bail is an order of the court. That an order of
E the court, unless set aside, be ignored or disobeyed with impunity, is wholly alien to the due administration of justice. It would be contrary to public policy and the public interest as it would lead to a breakdown of the rule of law. It has been said, in respect of non-bailable offences in *Emperor v Jiwan Lal Gauba* AIR 1936 Lah 730, that:

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> The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner. It is a sort of trust reposed in him by (the) court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by the court, he disentitles himself to the privilege so granted.

Whether the bail is mandatory or discretionary, the issue where bail has
G been breached is not the original offence with which the person has been charged, but the breach of the terms of a court order for bail. Even if the privilege of bail is mandatory, the issue is breach or abuse of the privilege. In other words, the fact that bail for the original offence is mandatory is irrelevant. To allow otherwise would be to condone the breach of bail terms in cases where bail is mandatory, leading to a flood of such breaches. To
H accept the argument that bail must be given after mandatory bail is breached would turn the administration of justice into a byword for ineptitude.

The CPC does not provide for the cancellation or revocation of bail. *PP v Wee Swee Siang* [1948] MLJ 114 is not authority to do so in cases where
I bail is mandatory since the case relates to a non-bailable offence. Revocation and cancellation, it was argued, cannot be based on inherent jurisdiction since in any case the lower courts do not have powers of inherent jurisdiction. *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 and

Datuk Yong Teck Lee & Ors v PP [1996] 2 MLJ 68 are authorities for the general proposition that the subordinate courts do not have inherent jurisdiction.

PP v Wee Swee Siang was not a case involving revocation or cancellation of bail. It was a case involving the refusal to grant bail. In my view, there is no question of the lower court relying on inherent power. Bail had been granted in this case. It cannot be, and has not been, suggested that where bail is mandatory but that the person refused to execute the bail bond, he is still to be released. The bond is a fundamental aspect of bail. The primary objective of bail is to ensure attendance. Where there has been a breach of that fundamental term of the bail, there cannot be any other consequence consistent with due administration of justice than that bail be ended, whether by revocation or cancellation. It cannot be said there is an exercise of an inherent jurisdiction. There is no contravention of s 387(1) of the CPC since bail had been granted, and a cancellation or revocation is simply a consequence of breach of its terms. Specific statutory power to cancel or revoke bail in such circumstances is unnecessary.

While the considerations in granting and revocation or cancellation are different, the revocation or cancellation of bail, regardless whether the bail is mandatory or discretionary in the first instance, are the same. But that is not to say that a cancellation or revocation is to be taken lightly or as mere formality. The general principle was stated in *Phang Yong Fook v PP* [1988] 1 MLJ 267, where Zakaria Yatim J (as he then was), distinguishing *PP v Wee Swee Siang*, said (at p 269):

> The considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses. ... .
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> Even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the court should not allow the application without giving the accused person an opportunity to be heard first.

The appellant in this case failed to attend court on the date of hearing. The proper course in the event of such a breach of an order for bail is to issue a warrant of arrest. When arrested and brought before the court, he must be given an opportunity to be heard as to why the bail granted to him should not be cancelled or revoked. The fact he had breached the bail order is prima facie a valid reason for cancellation or revocation, unless he has a good explanation. Generally, such explanation must be in the nature of why he is unable to attend court. A person who is sick but able to go to see a doctor is not necessarily unable to attend court. A 'medical certificate', unless it specifically states the patient must stay in bed, merely purports to recommend medical leave primarily that such person would be unable to work. It does not necessarily mean he cannot attend court. He may be able to attend, if only to ask for a postponement of the hearing. A medical certificate of itself is not an authority to overrule a court order to attend court. A satisfactory explanation must be in the nature of an *actus me invito factus, non est meus actus* (an act done by me against my will is not my act), that is, why he was prevented from attending.

A The next question, although not entirely relevant in this case, is whether the sessions court is obliged to extend fresh bail after the breach of the earlier bail, albeit on perhaps enhanced terms. The CPC provided for the grant of bail but is silent as to the consequences of its breach. While it is an accepted principle that bail may be granted at any stage, it is in my considered opinion manifestly absurd to suggest that s 387(1) intends that B bail must continue to be offered despite previous breach. A statute, even more than a contract, must be construed, *ut res magis valeat quam pereat*, so that the intentions of the legislature may not he treated as vain or left to operate in the air: *Curtis v Stovin* (1889) 22 QBD 512 at p 517, *Hawtrey v Beaufront Ltd* [1946] KB 280. It cannot be the intention of Parliament that C bail could be abused and yet further and fresh bail must be extended. Sense is to be made if possible in interpretation of a statute. That sense is only made that bail is mandatory to be offered once under the section, the continuation of that bail must be based upon continued compliance of its terms and the withdrawal of it if it is breached. The interpretation urged upon the court, on the other hand, makes s 387(1) vain and operating in the D air: the legislature might as well have provided that no person be held in custody pending trial in respect of such offences.

It does not appear in this case the appellant had been given an opportunity to be heard before his bail was revoked or cancelled. To that extent, the revocation or cancellation is bad in law. I had, therefore, ordered that the sessions court hear the appellant as to why bail should not be E cancelled or revoked. Evidence may be received as necessary.

Order accordingly.

Reported by Tan See Peng

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